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UNITED NATIONS COMMISSION ON INTERNATIONAL TRADE LAW

Twenty-fourth session

SUMMARY RECORD OF THE 455th MEETING

Held at the Vienna International Centre, Vienna,
on Thursday, 20 June 1991, at 9.30 a.m.

Chairman: Mr. SONO (Japan)

CONTENTS

International payments: draft Model Law on International Credit Transfers (continued)

Article 7 (continued)

Article 8

Article 9

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The meeting was called to order at 9.40 a.m.

INTERNATIONAL PAYMENTS: DRAFT MODEL LAW ON INTERNATIONAL CREDIT TRANSFERS (continued) (A/CN.9/341, 344 and Corr.1, 346 and 347 and Add.1)

Article 7 (continued)

1. The CHAIRMAN said that, at the previous meeting, the Commission had completed its consideration of article 7(5).

2. Mr. BHALA (United States of America) said he thought that the Commission had been close to reaching a decision at the previous meeting on whether the Model Law should contain a clear rule stipulating that either words or figures should prevail when a payment order contained an inconsistency between the two. Some confusion on the part of his own delegation had, perhaps, prevented such a decision from being reached, and he asked if the debate might be reopened on article 7(5) and, possibly, on article 9(3) as well.

3. The CHAIRMAN, observing that discussion of article 7(5) might be linked with that of article 9(3) but not with that of article 9(4), invited comments on the United States request.

4. Mr. GREGORY (United Kingdom) said that, in response to the request made to him by the Chairman at the close of the previous meeting, he had prepared a wording for article 7(5). He had tried to meet the United States concern regarding the need to detect a discrepancy and its desire that a bank's failure to notice one and relying on the figures in a payment order would not be in breach of the law and the Finnish concern regarding the conflict arising between liability provisions if a bank did not give notice but executed an order.

5. Mr. CRAWFORD (Canada) said that the procedure followed at the previous meeting had been somewhat confusing. As he understood the situation, the ad hoc drafting group presided over by the United Kingdom representative had been invited to report back to the Commission. In addition, he saw no reason why the Commission should be precluded from reopening the debate on discrepancies between words and figures in payment orders when it came to consider article 9(3).

6. Mr. ABASCAL ZAMORA (Mexico) said that he had no objection to the United States request. The Commission had not reached a final decision at the previous meeting.

7. The CHAIRMAN recalled that the Commission had decided to retain the original text with modifications to be submitted by the United Kingdom representative.

8. He suggested that the Commission should decide not to reopen the debate on article 7(5) for the moment and not to discuss the same issue under article 9(3) or article 9(4) but to reconsider the matter later in its session.

9. It was so decided.

10. The CHAIRMAN invited the Commission to consider article 7(6). He drew attention to the changes proposed by the Governments of Finland and the United Kingdom in document A/CN.9/347 and by the Government of the United States of America in document A/CN.9/347/Add.1. He noted that the Government of Finland had proposed that the paragraph should be relocated to follow paragraph 2 and asked for comments on the United Kingdom's proposed new wording for the paragraph.

11. Mr. NEWMAN (United States of America) said that what he could only describe as an operational nightmare could occur if a receiving bank were allowed to change an intermediary bank. For example, if a bank instructed by the Bank of China to credit a certain amount to the Chase Manhattan Bank for a beneficiary paid that amount to Manufacturer's Hanover Trust Co. instead, the result would be that the account at Manufacturer's Hanover Trust Co. was long and the account at Chase Manhattan short, because the Bank of China had already made use of the funds. Thus no rule allowing for a change in intermediary bank without immediate notification or request for further instructions should be permitted.

12. Changing a funds transfer system was less serious, since the funds would eventually reach the bank for which they were intended. Regarding changes in the means of transmission, a bank should not be allowed to send funds by mail if instructed to send them by cable, although the reverse would be in order. A receiving bank must not, however, be allowed to disregard an instruction of the sender specifying an intermediary bank.

13. He was unable to support the United Kingdom proposal.

14. Mr. CONOBOY (United Kingdom) said he failed to understand the position of the United States delegation. He shared that delegation's concern that the original text of article 7(6) would allow a receiving bank to take a unilateral decision to change an intermediary bank, thus disregarding the sender's instructions, and his Government's proposed amended text was designed to prevent such a situation from occurring.

15. Mr. POTYKA (Observer for Austria) said that the United Kingdom amended text was very clear and reflected, he thought, the views of the majority.

16. Mr. IWAHARA (Japan) said he could see little difference between the standpoints of the United Kingdom and the United States delegations. Their intentions seemed to be the same and he found the United Kingdom text very clear.

17. Mr. CRAWFORD (Canada) said he supported the United Kingdom proposal which would prevent a receiving bank from changing an intermediary bank unless it had received fresh instructions from the sender. The proposal included a reference to "the time required by article 10" as did the existing text. He asked the Chairman if his ruling concerning the extra day should be carried through to all the other related paragraphs and, consequently, to article 7(6).

18. The CHAIRMAN said that the Commission had agreed to include a provision for an extra day in article 7(4) only. The question might, if necessary, be raised again at a later stage.

19. Mr. BHALA (United States of America) said that article 7(6) was concerned with changing the sender's instructions regarding an intermediary bank, the funds transfer system or the means of transmission. The United States problem concerned the changing of an intermediary bank. The original text of article 7(6) left a receiving bank free to disregard the sender's instructions regarding an intermediary bank to be used in a given transaction.

20. The reason why the United States delegation believed that a receiving bank could change the funds transfer system or the means of transmission but not an intermediary bank was the following: if a beneficiary's bank (or the beneficiary) relied upon the receipt of funds at a designated intermediary bank and, consequently, drew down on its account with the intermediary bank in reliance upon that expected receipt, an overdraft might be created and damages might result. A receiving bank should not therefore be allowed unilaterally to disregard instructions on the designation of an intermediary bank.

21. A receiving bank should not be prevented from changing a funds transfer system or a means of transmission, without seeking the sender's agreement, if that would assist it to carry out a credit transfer order, but it should in no circumstances be allowed to change an intermediary bank without seeking such agreement.

22. Mr. LE GUEN (France) said he could not understand the objections raised by the United States representative. The definitions indicated that an intermediary bank was a receiving bank other than the originator's bank or the beneficiary's bank.

23. Mr. BISCHOFF (Observer for Switzerland) said he supported the United Kingdom proposal, according to which the receiving bank could not unilaterally change a payment order but could merely ask the sender for further instructions. He was therefore at a loss to understand the United States objections to that proposal.

24. He was not sure whether the United Kingdom proposal referred to a payment order that had been accepted but could not be executed for routing reasons or to one that had not been accepted and could not be executed for the reasons mentioned in article 6.

25. Mr. CONOBOY (United Kingdom) said that it was implicit in his Government's proposal on article 7(6) that the payment order had already been accepted. The purpose of the reference to article 7(2) was to make it clear that, if the bank issued the notice within the prescribed time-limit, it would not be in breach of its obligation to execute appropriately following acceptance.

26. Mr. NEWMAN (United States of America) said that his delegation supported the existing text of article 7(6), apart from the reference to an intermediary bank. According to the United Kingdom proposal, a bank had to ask the sender

(Mr. Newman, United States of America)

for instructions to change a funds transfer system. That would be unwise, as it would result in loss of time. If a payment order specified notification by mail and it was known that mail would not arrive in time, the bank should be permitted to transmit by cable; that would not change the value passed on to the next bank in the chain. On the other hand, if there was to be a change in the intermediary bank, an inquiry should always be made if payment to the specified bank were impossible. However, that was not permissible under the existing text.

27. The CHAIRMAN pointed out that the United Kingdom proposal did not permit the receiving bank to change an intermediary bank unilaterally.

28. Mr. NEWMAN (United States of America) said that, while that was so, the United Kingdom proposal did not permit a change in the funds transfer system or the means of transmission either, and that was wrong. All that was needed was a provision that the intermediary bank could not be changed, which could be achieved quite simply by deleting the words "an intermediary bank" in paragraph 6.

29. Mr. CONOBOY (United Kingdom) said that, according to his Government's proposal, the receiving bank would not be allowed to change the intermediary bank unilaterally, for if it did so it would be in breach of article 7(2).

30. With regard to the funds transfer system and the means of transmission, there might be a point of substance in the United States view regarding the choice of the funds transfer system and means of transmission. However, in an international environment, the choice of a funds transfer system might entail routing through a particular country, whereas the sender might have good reason not to wish funds to be routed through that country. He would have to be reassured that such a situation was very unlikely before he could accept the United States view regarding the possibility that the receiving bank might change the funds transfer system.

31. Mr. ERIKSSON (Observer for Sweden) said that, if a bank wished to change the first intermediary bank, and the first intermediary bank, in its turn, wished to change the second intermediary bank, there would be two courses open to it. It could either change the second intermediary bank or, if it were not allowed to do so, it could reject the payment order. If it rejected the payment order, the same problem that was of concern to the United States delegation would seem to arise.

32. Mr. NEWMAN (United States of America) said that, in practice, if his bank was unable to pay the designated intermediary bank direct, because it did not have an account with that bank, another intermediary bank would be chosen which was a common correspondent to both the banks. That would not change the ultimate purpose of the payment order. If that course of action could not be taken, a payment order would not be rejected as such but new routing instructions would be requested, and that would be tantamount to rejection.

33. Mr. CRAWFORD (Canada) said that, while he understood the concern of the United States delegation, he did not agree with the proposed solution, for the mere deletion of three words would still leave a number of problems. It would not be possible to permit the Model Law to empower a receiving bank to choose a different funds transfer system.

34. The United States representative had said that it would always be possible to substitute a more rapid means of transmission but the current drafting would, in fact, permit a slower means. That was a problem that could not be resolved by a minor drafting change.

35. The United States delegation appeared adamant that no change of intermediary bank could be tolerated, but the arguments it had advanced in favour of that proposition seemed hardly convincing, for the beneficiary would have no interest in the selection of the intermediary bank.

36. All in all, he thought that the United Kingdom proposal might be improved by including the possibility of substituting a more expeditious means of transmission, with a provision for referral back to the sender.

37. Mr. NEWMAN (United States of America) said that he had been referring not to the beneficiary but to the beneficiary's bank. It was the normal practice for banks to draw funds before they were credited. If his bank credited a foreign bank in, say, China, the foreign bank would receive notice that a sum of money would be available on a particular day. It would then draw the money on the day in question but there might be no funds available in the particular intermediary bank if it had been possible to change the routing.

38. With regard to the means of transmission and the related question of delay, he pointed out that mailing would cause delay while telex would not.

39. Mr. HUANG Yangxin (China) said that the discussion seemed to be straying from the point. The problem could be very simply resolved by assuming that a bank making an inquiry was thereby giving notice of rejection.

40. All delegations were of the opinion that a receiving bank should not change a payment order unilaterally. If that order specified transmission by telegram or mail, the receiving bank had no right to change it. In accordance with the normal rules, if a particular bank did not have an account with a designated intermediary bank, it could use any bank, but that would not change the payment order and would not, in essence, change the intermediary bank designated in the payment order.

41. Mr. HERZBERG (Observer for Israel) said that it might be better to delete paragraph 6. According to the general rule of law, a bank had a duty to approach the sender and obtain instructions in cases of doubt. The matter could be left to the general rule of law.

42. Mr. NEWMAN (United States of America) said that the statement by the representative of China seemed to indicate that, if there were specific

(Mr. Newman, United States of America)

instructions to give advice by mail, it would rule out use of the SWIFT procedure. He doubted whether that was the intention of the Chinese delegation.

43. Mr. HUANG Yangxin (China) said that if the payment order specified dispatch by mail, such an order could be rejected but its terms could not be changed, as there might have been very good reasons for the instructions given.

44. Mr. ABASCAL ZAMORA (Mexico) said that it was generally agreed that a receiving bank should not unilaterally change the intermediary bank. As a possible compromise, he suggested that the reference in the United Kingdom's proposal to the means of transmission be deleted and replaced by wording taken from the first sentence of article 7(6) in the existing text of the Model Law.

45. If the receiving bank wished to change the means of transmission in order to achieve faster transmission, then it should not be required to request authority.

46. Mr. LIM (Singapore) said that a decision should be reached whether or not the receiving bank was to be allowed to make a unilateral change in the designated funds transfer system and means of transmission. While there seemed to be general agreement that a bank should not be allowed to change the intermediary bank without a prior inquiry, there seemed to be no good reason why it should not change the funds transfer system or means of transmission if the payment order were executed on time.

47. He agreed with the representative of Canada that it would not be sufficient merely to delete three words from the existing text of article 7(6). The article should explicitly state what criteria were to be applicable to unilateral action. For example, if the instructions stated that a payment order should be transmitted by post and there was a postal strike, the receiving bank should be allowed to transmit it by a more expeditious means.

48. Mr. BHALA (United States of America) said he completely agreed with the representative of Singapore. The Commission should proceed on the lines that representative had suggested.

49. Mr. CONOBOY (United Kingdom) said that the concerns of many delegations might be met by simply deleting the words "means of transmission" from the text proposed by his Government. There would be no liability under the Model Law for a bank that speeded up transfers; however, if a bank unilaterally chose a slower means of transmission that resulted in delays, it would do so at its own risk and article 16 would apply.

50. Mr. KAKOLECKI (Observer for Poland) said that he had sympathy for the views expressed by the representatives of Singapore, the United States and the United Kingdom. One problem that still remained was that of the general rule which specified that a payment order should be executed exactly according to

(Mr. Kakolecki, Observer for Poland)

instructions. However, the Model Law should, perhaps, specify that it was permissible for a bank to choose a more expeditious way of transmitting payment orders.

51. Mr. VASSEUR (Banking Federation of the European Community) said that he could not agree that the receiving bank should be able unilaterally to change a prescribed means of transmission by substituting a more rapid means. In a major French bank, transmission by post was the rule in about one quarter of the cases. As the representative of China had rightly said, if the originator had given instructions for transmission by post, he had good reasons to do so. It was not permissible, therefore, for a bank to choose a more expeditious means of transmission without consulting the sender. As a general rule, the instructions given should be obeyed.

52. The CHAIRMAN said that, if he heard no objection, he would take it that the Commission wished to adopt the text of article 7(6) proposed by the Government of the United Kingdom (A/CN.9/347, p. 59), with the revision made orally by the United Kingdom representative.

53. It was so decided.

54. The CHAIRMAN invited the Commission to consider article 7(7).

55. Article 7(7) was approved.

Article 8

56. The CHAIRMAN invited the Commission consider article 8. He suggested that paragraph 1(a) of the article should be redrafted to bring it into line with article 6. The square brackets around "execution" would be deleted.

57. A decision regarding the square brackets in paragraph 2 would be taken when a satisfactory definition of "execution date" had been agreed upon.

58. Mr. ERIKSSON (Observer for Sweden) said that the reference to "a court" in subparagraph (g) was too narrow. He suggested the addition of "or another competent legal authority".

59. Secondly, subparagraph (g) gave the impression that banks were always permitted to apply the credit to a debt of the beneficiary, although under many legal systems that was not allowed except by agreement with the beneficiary or by court order. He suggested that the reference be deleted. Alternatively, the words "if it is allowed" could be inserted after "when the bank" in order to clarify that it could be done only with the agreement of the beneficiary or in accordance with the applicable law.

60. Mr. GREGORY (United Kingdom) said that subparagraph (g) made no comment on the entitlement of a bank to apply the credit to a debt of the

(Mr. Gregory, United Kingdom)

beneficiary. It merely stated that the fact of so doing constituted acceptance. The question of entitlement would be decided by the applicable law.

61. Mr. KAKOLECKI (Observer for Poland) said he was in favour of adding the reference to a "competent authority", since there were authorities other than courts in his country capable of deciding such matters.

62. He agreed with the United Kingdom representative's comments on the entitlement of a bank to apply the credit to a debt. The assumption underlying the Model Law must be that banks would act in accordance with the applicable law, so there was no need to state it explicitly.

63. Mr. ABASCAL ZAMORA (Mexico) said that article 9(1) clearly accommodated the concern of the observer of Sweden by stating that, upon acceptance of a payment order received, the beneficiary's bank was obligated to place the funds at the disposal of the beneficiary.

64. Mr. ADEDIRAN (Nigeria) said that, if the list of earliest times when a payment order was accepted by the beneficiary's bank was intended to be exhaustive, the object could be achieved by deleting subparagraphs (d), (e) and (g), and deleting the words "as instructed in the payment order" from subparagraph (f).

65. Mr. KOMAROV (Union of Soviet Socialist Republics) said he was able to accept article 8(1) as it stood because it established the minimum legal basis for acceptance or rejection of a payment order. He agreed with the United Kingdom representative that there was no need in the case of subparagraph (g) to state expressly that the application of a credit to a debt was subject to the agreement of the beneficiary or the applicable law.

66. The CHAIRMAN said that, if he heard no objection, he would take it that the Commission wished to approve the existing text of subparagraphs (d), (e), (f) and (g) of article 8(1), on the understanding that the Drafting Group would expand the term "court" in subparagraph (g) to include the idea of "any competent authority".

67. It was so decided.

Article 9

68. The CHAIRMAN suggested that the Commission, when considering article 9, might wish to adopt the same approach that it had used when dealing with article 7.

69. Mr. BHALA (United States of America) said that his delegation had been given to understand, at an earlier stage in the meeting, that the subject of discrepancies between words and figures could be discussed under article 9(3).

70. The CHAIRMAN said that the Commission had decided to postpone discussion of that problem until later in its session, specifically mentioning that it would not be discussed under article 9(3) or 9(4).

71. After a procedural discussion in which Mr. BHALA (United States of America), Mr. NEWMAN (United States of America) and Mr. CRAWFORD (Canada) took part, the CHAIRMAN said that, while the Commission could hardly go back on such a recent decision, the issue in question might be tackled if time permitted.

72. Mr. POTYKA (Observer for Austria) recalled that his delegation had raised another problem under article 8 which, it had been told, could be discussed under article 9. There seemed to be an inconsistency between the two articles, in that article 9(1) stated that the beneficiary's bank was obligated, upon acceptance of a payment order, to place the funds at the disposal of the beneficiary although, under the conditions set forth in article 8(1)(d), (e), (f) and (g), it might not be able to do so.

73. The CHAIRMAN said that the rules in article 8(1)(d), (e), (f) and (g) had nothing to do with execution. As he understood it, the problem of the Austrian observer was covered implicitly by the last part of article 9(1). The issues dealt with under articles 8 and 9 were quite distinct and the Commission, like the Working Group, had decided that article 9(1) was concerned with the relationship between the beneficiary and the beneficiary's bank, which was outside the scope of the Model Law.

74. Mr. ABASCAL ZAMORA (Mexico) said that a bank had to accept a payment order in accordance with article 8(1) and execute it in accordance with article 9. There should be no contradiction. While the concepts of acceptance and execution were legally different, the fact that a bank expressed its willingness to accept when it executed an order meant that, in practice, execution was the same as acceptance.

75. Ms. KOSKELO (Observer for Finland) said that the Austrian observer's problem was probably a drafting one, stemming from the wording of article 9(1), which referred only to the placing of funds at the disposal of the beneficiary. That wording was, in fact, too narrow because it gave the impression that the beneficiary's bank must always place the funds at the disposal of the beneficiary, despite the provisions of article 8(1)(d), (e), (f) and (g). She suggested that the difficulty might be resolved if the words "or otherwise apply the credit" were inserted after the word "beneficiary" in the second line of article 9(1).

76. The CHAIRMAN said that, in his opinion, the words "place the funds at the disposal of the beneficiary" covered the situation referred to by the observer for Finland. It was a very broad reading but, since article 9(1) referred to the payment order and the applicable law, its purport was clear. All those issues were left to the applicable law.

77. Mr. LOJENDIO OSBORNE (Spain) said that article 9(1) should be left as it stood. The problem referred to by the observers for Austria and Finland could be resolved by an appropriate reference in article 16(6).

78. Mr. POTYKA (Observer for Austria) explained that he had raised the issue because of certain problems under Austrian law. He would not press it, however, since it seemed that other countries did not have the same problem.

79. Mr. CRAWFORD (Canada) said that he still had some lingering doubts concerning the breadth of the interpretation of the words "placing funds at the disposal of the beneficiary" in article 9(1). The same words were used in article 8(1)(d) and were rapidly acquiring an accepted meaning in the context of the Model Law. Unless the suggestion by the observer for Finland were accepted, there was a risk of conflict between article 9(1) and article 8(1)(f), in view of the content of article 8(1)(d).

80. The CHAIRMAN said that article 8 should have no implications for article 9(1), which was concerned with the applicable law and not the Model Law. The representative of Canada seemed to be confusing the two.

81. Mr. ADEDIRAN (Nigeria) said that he, too, found an apparent contradiction between article 8 and article 9(1). He supported the suggestion made by the observer for Finland.

82. The CHAIRMAN said that the intention of the Working Group had been that the funds should be placed at the disposal of the beneficiary in accordance with the payment order, all other issues being subject to the applicable law. It was essential that acceptance and execution be kept separate.

83. Mr. GREGORY (United Kingdom) said he shared the unease of the representative of Canada. If the problem was really a drafting one, he could see no harm in the Finnish suggestion which the representative of Nigeria had supported.

84. The CHAIRMAN said that, if he heard no objection, he would take it that the Commission agreed that the issue was a drafting one with no substantive implications and that the suggestion by the observer for Finland should be submitted to the Drafting Group.

85. It was so decided.

The meeting rose at 12.30 p.m.